NO. 48481-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY HAND, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Edmund Murphy

No. 14-1-04060-3

BRIEF OF RESPONDENT

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2. Should this Court deny defendant's motion for waiver of costs when the State has yet to substantially prevail and has not submitted a cost bill to which defendant may object?

B. STATEMENT OF THE CASE.

On September 22, 2014, the Pierce County Prosecutor's Office (State) charged Anthony Gene Hand (defendant) with one count of escape in the first degree. CP 1. Defendant was arrested and taken into custody on October 1, 2014. CP 274, 498. On October 9, 2014, the State added one count of unlawful possession of a controlled substance. CP 275.[1] Bail was set at $30,000 for the escape charge and $20,000 for the unlawful possession of a controlled substance charge. CP 4-5, 276-77. Bond was never posted. 12/11/14RP 2. Defendant remained in custody from October 1, 2014, when

[1] The two cases, cause number 14-1-03717-3 and cause number 14-1-04060-3, were consolidated at trial and in this appeal.

he was arrested until June 10, 2015, when he was released following an order transferring his cases to mental health court. CP 197-99.

On December 11, 2014, defendant raised the issue of competency. 12/11/14RP 2-3. The trial court ordered an evaluation of defendant at which time his trial date was tolled pursuant to CrR 3.3(e)(1)[2]. CP 13-17. A no bail hold was placed to facilitate defendant's evaluation for competency at Western State Hospital. CP 11-12. During the evaluation, defendant demonstrated a capacity to form a factual and rational understanding of the pending criminal proceedings. CP 18-27. Nevertheless, the examiner opined defendant lacked the capacity to meaningfully assist in preparing his own defense. CP 18-27. The trial court responded to the evaluator's opinion by ordering defendant transferred to Western State Hospital within 15 days for a duration of no more than 45 days for competency restoration. CP 30-32; 12/24/14RP 4.

On February 11, 2015, defendant moved to dismiss or, in the alternative, for an order compelling Western State Hospital to show cause because he had not yet been transferred for competency restoration. CP 39-40, 45-47; 2/18/15RP 3. The trial court denied the motion to dismiss without prejudice and set a hearing for February 25, 2015, to revisit the motion and

[2] Criminal Rule 3.3(e) Time for Trial Excluded Periods provides, "The following periods shall be excluded in computing the time for trial: (1) All proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding defendant to be competent."

order to show cause. 2/18/15RP 9. Defendant filed a new motion to dismiss when the hearing was held requesting release from custody as an alternative remedy. CP 79-81. The trial court set the hearing over one week to enable the State to respond. 2/25/15RP 5, 8. After hearing arguments on March 4, 2015, the trial court found no due process violation and denied defendant's motions to dismiss. 3/4/15RP 11.

Defendant was admitted to Western State Hospital on March 10, 2015. CP 111. While there, defendant refused to participate in competency restoration activities, to take recommended antidepressants, and to meet with treatment providers. CP 112-113. Defendant manifested a strategic reluctance to appear competent for trial or to cooperate with treatment while working to resolve his legal issues. CP 112-113. He had been "noted to logically indicate to treatment providers that demonstrating his trial related competence and cooperating with treatment would not be in his best interest." CP 113. Defendant communicated his strategy of appearing incompetent when he continually expressed there was "no advantage in him being found competent just to be locked up in prison." CP 112-113. Even with his lack of participation in treatment, defendant displayed the capacity to have a factual and rational understanding of the criminal proceedings and the capacity to rationally assist in his defense. CP 116. Defendant's evaluation revealed he was competent to stand trial. CP 116.

The trial court found defendant competent on April 29, 2015. CP 119-120. Bail was imposed again and set at $20,000 for the escape charge

and $20,000 for the unlawful possession of a controlled substance charge. CP 274-75, 529-30. Defendant was never able to obtain his release even with bail set at the lower amount.[3] Defendant entered into mental health court on June 10, 2015. CP 197-199. He was discharged from mental health court on October 21, 2015, after failing to comply with the terms and conditions imposed by the mental health team numerous times.[4] CP 210-215.

On November 20, 2015, after a stipulated facts bench trial, the trial court found defendant guilty for each count charged in his consolidated cases. CP 265-268, 497-499. Defendant was sentenced to a standard range sentence. 12/4/15RP 51; CP 250-262, 506-519. The trial court imposed mandatory legal financial obligations, with the exception of the DNA fee. 12/4/15RP 53. Defendant filed a timely notice of appeal. CP 269, 524.

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[3] A review of the filings identified by the clerk's papers show there was no bail bond posted in this case. *See* Evidence Rule 201(c) which provides, "A court may take judicial notice, whether requested or not." *See also* Brief of App. 7 where he acknowledged he was unable to post bail.

[4] Defendant was brought before the trial court eight times for failing to comply with conditions between June 10, 2015, and September 2, 2015. Defendant failed to appear for his September 9, 2015, hearing and was subsequently picked up on a warrant on October 8, 2015. CP 210-215.

C. ARGUMENT.

1. DEFENDANT'S CONVICTIONS SHOULD BE AFFIRMED BECAUSE THE PRETRIAL DELAY DEFENDANT MISTAKENLY CHALLENGES UNDER THE DUE PROCESS CLAUSE WITH AN UNSUBSTANTIATED CLAIM OF PREJUDICE WAS JUSTIFIED TO RESTORE HIM TO COMPETENCY AND DID NOT VIOLATE THE SIXTH AMENDMENT'S CONTROLLING SPEEDY TRIAL CLAUSE OR AMOUNT TO PREJUDICIAL GOVERNMENT MISMANAGEMENT UNDER CrR 8.3.

a. Defendant's challenge to the pretrial delay attending his competency restoration is procedurally barred due to his failure to raise or argue the claim under the Sixth Amendment's controlling Speedy Trial Clause.

RAP 10.3(a)(4) requires an appellant's brief to contain a separate and concise statement of each error together with the issues pertaining to the error. "The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." RAP 10.3(g). The appellant's challenge must be clear in order for appellate courts to reach the merits of the case. ***State v. Ross***, 141 Wn.2d 304, 311, 4 P.3d 130 (2000). Arguments unsupported by applicable authority and meaningful analysis should not be considered. ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); ***State v. Elliot***, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); ***Saunders v. Lloyd's of London***, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); ***In re***

Disciplinary Proceeding against Whitney, 155 Wn.2d 451, 467, 120 P.3d 550 (2005) (*citing* ***Matter of Estate of Lint***, 135 Wn.2d 518, 532, 957 P.2d 755 (1998)) (declining to scour the record to construct arguments for a litigant); RAP 10.3(a).

Though defendant has not called it this, he is raising a Sixth Amendment Speedy Trial issue. Where a particular Amendment within the Bill of Rights provides an "explicit textual source of constitutional protection" against particular government behavior that Amendment must be the guide for analyzing the claim, not the more generalized notion of due process. ***Albright v. Oliver***, 510 U.S. 266, 273, 114 S. Ct. 807 (1994). The Speedy Trial Clause of the Sixth Amendment provides the explicit textual source for the constitutional protection defendant seeks to invoke. A delay after formal charge or incarceration following arrest engage the particular protections of the Speedy Trial Clause of the Sixth Amendment. ***U.S. v. Lovasco***, 431 U.S. 783, 788-89, 97 S. Ct. 2044 (1977).

The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity. ***Albright***, 510 U.S. at 272. The United States Supreme Court has recognized that beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation in the field of criminal law. ***Medina v. California***, 505 U.S. 437, 443, 112 S.Ct. 2572 (1992). The Court explained that the "Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the

expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order. *Id.*

Defendant may not invoke the doctrine of "due process" to support his claim where procedures which comport with due process have been followed. Defendant's due process rights were properly protected when his trial was tolled pending competency restoration pursuant to RCW 10.77 et seq. *See* ***State v. Coley***, 180 Wn.2d 543, 551, 326 P.3d 702 (2014). RCW 10.77.050 provides, "[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." Criminal proceedings are automatically stayed once a court orders an evaluation under RCW 10.77.060(1) and until the court determines the defendant is competent to stand trial. ***State v. Harris***, 122 Wn. App. 498, 505, 94 P.3d 379 (2004). "The courts give this particular tolling provision broad scope precisely because the evaluation process is unpredictable and beyond the court's control." *Id.* These statutory procedures comport with due process. *See generally* ***State v. Heddrick***, 166 Wn.2d 898, 903-04, 215 P.3d 201 (2009). Defendant concedes the State followed the procedures outlined in RCW 10.77. Brief of App. 9. Sixth Amendment analysis applies directly to defendants seeking relief from

prejudicial delays in their criminal prosecutions. *See* ***Trueblood v. Washington State Dept. of Social and Health Services***, 882 F.3d 1037, 1043 (9th Cir. 2016).

Because the Speedy Trial Clause of the Sixth Amendment controls the issue, defendant was required to provide analysis of and support for his claim of error under that clause. However, defendant has not alleged any error under the Sixth Amendment nor provided any authority under the Sixth Amendment to support his claim. He failed to properly bring the claim before this Court, thereby procedurally barring the claim pursuant to the rules of appellate procedure.

b. Even if a Sixth Amendment challenge to the pretrial delay for competency restoration were properly before this Court, it would fail through application of the four factor test that determines Speedy Trial Clause violations.

Whether the constitutional right to speedy trial has been violated is determined by examining four factors: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his rights, and (4) prejudice to the defendant. ***Barker v. Wingo***, 407 U.S. 514, 530, 92 S.Ct. 2181 (1972). These factors are not exclusive, however, and the inquiry is necessarily dependent on the specific circumstances of each case. ***State v. Iniguez***, 167 Wn.2d 273, 283, 217 P.3d 768 (2009).

i. The length of delay weighs against a speedy trial violation.

There is no constitutional basis for qualifying the speedy trial right into a specified number of days or months. ***State v. Campbell***, 103 Wn.2d 1, 15, 691 P.2d 929 (1984) (*citing* ***Wingo***, 407 U.S. at 523). To prevail on a claim of a speedy trial violation, defendant must show the length of the delay "crossed a line from ordinary to presumptively prejudicial." ***Iniguez***, 167 Wn.2d at 283. There is no formulaic presumption of prejudice upon the passing of a certain period of time. *Id.* at 292. "A mere lapse of time is not sufficient to warrant the conclusion that there has been a denial of a speedy trial." ***State v. Johnson***, 79 Wn.2d 173, 180, 483 P.2d 1261 (1971).

Delays of up to 10 years may not violate the Sixth Amendment provided the delay was not deliberate, oppressive, or vexatious. *E.g.*, ***State v. Alter***, 67 Wn.2d 111, 114, 121, 406 P.2d 765 (1965); ***Johnson***, 79 Wn.2d at 181; ***Iniguez***, 167 Wn.2d at 293; ***State v. Ollivier***, 178 Wn.2d 813, 821, 826, 312 P.3d 1 (2013). In ***Alter***, the delay of almost 10 years was not unreasonable and did not violate the right to a speedy trial. ***Alter***, 67 Wn.2d at 121-22. In ***Johnson***, the Court found no violation of the defendant's right to a speedy trial from a delay of more than two years. ***Johnson***, 79 Wn.2d at 181. In ***Iniguez***, the length of delay was over eight months. ***Iniguez***, 167 Wn.2d at 293. The Court found that was not necessarily an undue delay and only just beyond the bare minimum necessary to trigger a ***Barker*** inquiry at

all. ***Iniguez***, 167 Wn.2d at 293. In ***Ollivier***, the 23-month delay was "not unduly long" and did not violate the Speedy Trial clause. ***Ollivier***, 178 Wn.2d at 821, 846. The Court cited numerous cases that had not regarded delays in excess of 23 months as exceptionally long in support of its finding. *Id.* at 828-29.

Here, the approximately two month delay was considerably shorter than the delays in the aforementioned cases where no violation of the Speedy Trial clause were found. It was over six months less than the delay held in ***Iniguez*** as only slightly enough to trigger an inquiry. Defendant has failed to show the length of delay was presumptively prejudicial, much less that is was sufficient for this factor to weigh in favor of a violation.

ii. The reason for the delay weighs against a speedy trial violation.

Where the reason for the delay is primarily due to efforts to restore the defendant to competency, the delay is not unreasonable and does not violate the right to a speedy trial. ***Alter***, 67 Wn.2d at 121-22; *see generally* ***Harris***, 122 Wn. App. at 506-07. In ***Alter***, the delay was due to efforts to restore the defendant to competency. *Id.* 113-14. The Court found good cause for the delay as it was "solicitous of defendant's welfare." *Id.* at 121-22. The Court distinguished a reasonable delay of that nature from unreasonable delays, which are deliberate, oppressive, or vexatious. *Id.* at 121.

The delay in this case resulted from the competency issue raised by defendant and was necessary to protect his right not to be tried while incompetent. As in ***Alter***, the reason for the delay was solicitous of defendant's welfare as it was primarily to restore him to competency so he could meaningfully assist in his own defense.

The record does not support an inference that the approximately two month delay was deliberate, oppressive, or vexatious. Examples of such delays are those which are deliberate in an attempt to frustrate the defense. ***Wingo***, 407 U.S. at 531. Delays requested in order to take advantage of a pending, favorable change in the law are undertaken in bad faith and are therefore improper. ***State v. Rich***, 160 Wn. App. 647, 645-55, 248 P.3d 597 (2011). Here, the purpose of the delay was to ensure defendant was competent to stand trial and could assist in his own defense. As such, the reason for the delay was not in bad faith nor could it be characterized as an attempt to frustrate the defense. The reason for the delay complained of was legitimate and weighs against a speedy trial violation.

iii. Defendant asserted his right to a speedy trial without proper analysis or support.

The State concedes defendant raised a speedy trial violation issue in his February 11, 2015, motion to dismiss the case, 34 days after he was to be transferred to Western State Hospital for competency restoration. CP 39-40. However, defendant failed to provide the required analysis of the ***Barker*** factors. He provided no analysis of how the 34 days up to that point might

affect his right to a fair trial. Merely stating he suffered prejudice to his right to a speedy trial with no analysis or support does not provide the trial court the means necessary to assess his claim. *See generally* ***Ollivier***, 178 Wn.2d at 827; *see also* ***Elliot***, 114 Wn.2d at 15. Further, defendant provided no basis for the remedy he sought. Defendant could have requested release pending transfer or sought an injunction requiring transfer, but he did neither. Defendant was transferred to Western State Hospital 27 days after filing his motion to dismiss. While defendant technically raised a speedy trial violation claim, it lacked any analysis or support from which a court could make an informed ruling.

iv. Defendant failed to show his right to a fair trial was prejudiced.

The analysis under the Sixth Amendment Speedy Trial Clause turns now on whether defendant's trial right was prejudiced. Defendant has failed to raise or show he was prejudiced by the delay. In ***State v. Rohrich***, the Court held an 18 month delay did not prejudice the defendant when he failed to show the witnesses' memories were actually compromised by some extraordinary circumstance occurring during the delay. ***State v. Rohrich***, 149 Wn.2d 647, 659, 71 P.3d 638 (2003). In ***State v. Stein***, the Court held that although many witnesses had faded memories of events surrounding the charges, the five year delay did not prejudice the defendant because there were transcripts that could be used to refresh memories or impeach witnesses. ***State v. Stein***, 140 Wn. App. 43, 58-59, 165 P.3d 16 (2007).

Here, witness memories or impeachability was never made relevant. There is no record or claim of witnesses in this case whose memory or impeachability was compromised on account of the challenged delay. In fact, defendant never challenged evidence presented against him when he elected to proceed via stipulated facts bench trial. In a stipulated facts trial, the defendant does not waive his right to present evidence or cross-examine witnesses but he agrees by stipulation that what the State presents is what the witnesses would say. ***State v. Johnson***, 104 Wn.2d 338, 342, 705 P.2d 773 (1985); ***State v. Mierz***, 127 Wn.2d 460, 469, 901 P.2d 286 (1995). Even if defendant had elected to be tried by a jury, the evidence proving his crime was not subject to the failings of witness memories. The evidence the court considered consisted of reports from the Alternative to Confinement Program and documents signed by defendant regarding the requirement to comply and consequences for non-compliance. The operative fact witness in this case was the arresting officer. The type of interaction between an arresting officer and a defendant is specific, purposed, and well-documented. In this case we have a professional police officer with a complete report of his contact with defendant. CP 265-68. There is nothing in the record to raise a reasonable inference that the officer's ability to recollect his interaction with defendant was compromised. However, had the officer's memory been lacking in any way, a police report is exactly the type of evidence used to refresh the recollection of a testifying police

officer. ER 612 (Writing Used to Refresh Memory); ER 803(a)(5) (Recorded Recollection).

Defendant waived his right to challenge the credibility of witnesses or the clarity of their recollection when he failed to raise such a challenge with the trial court. Defendant has made no argument nor pointed to any facts in the record indicating how the trial was affected by the two month delay, thereby failing to show that his right to a fair trial has been prejudiced. Therefore, this factor weighs against a speedy trial violation.

Under the ***Barker*** factors, defendant's right to a speedy trial was not violated. The length of the delay was well below those weighed against a speedy trial violation and was not shown to be presumptively prejudicial. The reason for the delay was legitimate and weighs against a speedy trial violation because it was for good cause and solicitous of defendant's welfare. Defendant did assert his right to speedy trial, though without analysis or support. Finally, the fourth ***Barker*** factor weighs against a speedy trial violation because defendant failed to show any prejudice affecting his right to a fair trial. Therefore, the approximately two month delay did not violate the Speedy Trial Clause under the Sixth Amendment.

c. Defendant failed to show governmental misconduct on the part of the prosecution or actual prejudice affecting the fairness of his trial.

A trial court's denial of a motion to dismiss under CrR 8.3(b) [5] is reviewed for an abuse of discretion which can only be reversed if that decision is manifestly unreasonable or based on untenable grounds. ***State v. Wilson***, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). A defendant must show by a preponderance of the evidence both governmental misconduct and prejudice affecting a defendant's right to a fair trial before a trial court may dismiss charges under CrR 8.3(b). ***Rohrich***, 149 Wn.2d at 654. "Dismissal under CrR 8.3(b) is an extraordinary remedy that the trial court should use only as a last resort." ***State v. Thompson***, 190 Wn. App. 838, 360 P.3d 988 (2015). CrR 8.3(b) was not designed to grant courts the authority to substitute their judgment for that of the prosecutor. ***State v. Cantrell***, 111 Wn.2d 385, 390, 758 P.2d 1 (1988). When the judgment of the trial court can be sustained on any grounds, stated or unstated, that judgment should not be disturbed. ***State v. Armstead***, 40 Wn. App. 448, 449-50, 698 P.2d 1102 (1985); ***State v. Williams***, 104 Wn. App. 516, 524, 17 P.3d 648 (2001). A trial court's conclusions of law are reviewed de novo. ***State v. Doughty***, 170 Wn.2d 57, 61, 239 P.3d 573 (2010).

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[5] Criminal Rule 8.3(b) On Motion of Court provides, "The court, in furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial."

The trial court properly exercised its discretion in denying defendant's motion after considering arguments presented by defendant and the State. The court found no due process violation and stated its belief the arguments raised in support of dismissal were without merit. CP 98; 3/4/15RP 11. Arguments presented by the State that defendant failed to show he was prejudiced by an alleged due process violation and considered by the trial court detailed defendant's extensive criminal history, his inability to post bail, and alternative remedies available to defendant such as filing a civil suit in Federal Court. 3/4/15RP 9-10. The trial court's denial of the motion to dismiss is supported not only by the stated finding of no due process violation but also by defendant's failure to show governmental mismanagement on the part of the prosecution or actual prejudice affecting the fairness of his trial. Therefore, the judgment of the trial court should be sustained.

i. The actions of Western State Hospital as an independent agency were not attributable to the prosecution for purposes of CrR 8.3(b) analysis.

The actions complained of by defendant were those of Western State Hospital which is an independent government agency, and not those of the prosecutor. The actions of an independent government agency not involved in prosecution cannot constitute "government misconduct" for purposes of CrR 8.3. *See* ***State v. Starrish***, 86 Wn.2d 200, 206, 544 P.2d 1 (1975).

"[C]ase law clearly requires a showing of governmental misconduct ... by the trial judge or prosecutor in order to dismiss ... under CrR 8.3(b)." *Id.* Courts have recognized that misconduct by police and police agencies assisting in the prosecution may constitute government misconduct under CrR 8.3(b). ***State v. Granacki***, 90 Wn. App. 598, 602, 959 P.2d 667 (1998); ***State v. Holifield***, 170 Wn.2d 230, 240 P.3d 1162 (2010). However, Western State Hospital is not the police nor a police agency. Western State Hospital operates under the Department of Social and Health Services for the State of Washington. Its purpose is the evaluation of and treatment for mental health issues. *See generally*, RCW 72.23.025. Whereas the purpose of a police agency is detection and apprehension of persons violating traffic or criminal laws. *See generally*, RCW 10.93.020. The two are distinct agencies serving different needs of the community.

The inability of Western State Hospital to transfer defendant within 15 days of the order to restore him to competency cannot be attributed to the prosecution and therefore, cannot be considered governmental misconduct for the purposes of dismissal under CrR 8.3.

ii. Defendant failed to show governmental misconduct.

Even if Western State Hospital were deemed to be an agency assisting the prosecution, defendant has failed to show governmental misconduct on their part. Governmental misconduct cannot be shown where the state has not ignored or egregiously neglected its obligations nor

engaged in unfair gamesmanship. ***State v. Wilson***, 149 Wn.2d 1, 11, 65 P.3d 657 (2003). For example, delays caused by administrative issues such as scheduling difficulties beyond the control of the trial court do not constitute governmental misconduct. ***State v. Cannon***, 130 Wn.2d 313, 327, 922 P.2d 1293 (1996). In ***Cannon***, the trial court granted three continuances when the deputy prosecutor was occupied by another trial, the parties were awaiting DNA test results, and another case was ready to be heard in the same court. The Court distinguished the specific scheduling difficulties of the deputy prosecutor as reasonable requests for continuances from an insufficient justification of a generalized reference to docket congestion. *Id.*

Governmental misconduct has been shown where the deliberate actions of the State required the defendant to choose between going to trial unprepared or waiving his right to a speedy trial. ***State v. Salgado-Mendoza***, 194 Wn. App. 234, 373 P.3d 357 (2016); ***State v. Michielli***, 132 Wn.2d 229, 245, 937 P.2d 587 (1997). In ***Salgado-Mendoza***, the State failed to timely disclose or make sufficient efforts to produce evidence within its direct control. ***Salgado-Mendoza***, 194 Wn. App. at 248. In ***Michielli***, the State delayed adding four new serious charges until three business days prior to the scheduled trial date. The Court found the State's action unfair to the defendant when the State expressly admitted it had the information necessary to file the charges earlier. ***Michielli***, 132 Wn.2d at 246.

Here, there is no showing of deliberate actions on the part of the State forcing defendant to choose between going to trial unprepared or

waiving his right to speedy trial. The actions complained of by defendant were administrative and not within the State's control, similar to ***Wilson***. The two month delay in transferring defendant was due to administrative factors outside of the control of Western State Hospital. CP 337. Factors affecting Western State Hospital's ability to admit defendants include an annual average of an 8 percent increase in court orders to transfer defendants to Western State Hospital for inpatient evaluation and restoration, and a 30 percent increase in competency referrals in the three years preceding defendant's referral. CP 337. At the time of defendant's trial, the waitlist for a competency based admission at Western State Hospital was approximately 113 defendants. CP 336-37. The average wait for a 45 day restoration case was 71 days, approximately 10 days longer than the delay experienced by defendant. CP 337.

In light of these challenges, Western State Hospital has made considerable efforts to accept defendants awaiting competency restoration services as early as possible. CP 325. However, because a bed remained unavailable for defendant, the only possible way to expedite his admission would have been to unfairly prioritize him over the many other similarly situated defendants on the waitlist for admission. CP 325.

The legislature contemplated the effect of increased referrals of defendants for restoration services on the ability of Western State Hospital to meet target transfer timelines and accounted for that effect in RCW 10.77. The legislature provided that an unusual spike in the receipt of evaluation

referrals shall be a defense to an allegation that time limits were exceeded for completion of competency services. RCW 10.77.068(1)(c)(vi). A 30 percent increase in referrals in only three years is a considerable spike. The legislature has explicitly recognized its appreciation for the fact that state hospitals are incapable of complying with time recommendations and limits for transfers for competency restoration. The inability to comply cannot "form the basis for a motion to dismiss criminal charges." RCW 10.77.068(5).

Washington courts have specifically addressed the fact that Washington law is "silent" regarding the length of time a criminal defendant may be incarcerated while awaiting competency restoration. In ***Weiss v. Thompson***, the Court noted that the "Washington statute is silent on the amount of time that can elapse between entry of the order for competency restoration and the time placement actually occurs." ***Weiss v. Thompson***, 120 Wn. App. 402, 410 n.3, 85 P.3d 944 (2004) *review denied*, 152 Wn.2d 1033, 103 P.3d 202 (2004). Defendant has failed to show the approximately two month delay was governmental misconduct; therefore, dismissal under CrR 8.3 is not warranted.

iii. Defendant failed to show actual prejudice affecting the fairness of his trial.

A necessary element that must be shown by a defendant before a trial court can dismiss charges under CrR 8.3(b) is prejudice affecting

defendant's right to a fair trial. ***State v. Michielli***, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). Defendant must show actual prejudice; the mere possibility of prejudice is insufficient. ***Rohrich***, 149 Wn.2d at 657-58. Delay itself it not prejudice absent a showing of actual prejudice to the defendant's right to a fair trial. ***State v. McConville***, 122 Wn. App. 640, 646, 94 P.3d 401 (2004). In ***McConville***, the Court determined the defendant suffered no prejudice from a 16-month delay despite the death of a defense witness during that time because the witness's testimony would not have been exculpatory. *Id.* at 646-47.

As demonstrated in the previous section, defendant has failed to allege that the two month delay had any effect on the fairness of his trial, much less that it prejudiced the trial. Defendant has not alleged or proved he would have called any witnesses that became unavailable as a consequence of the relevant delay nor has he alleged or proved that his or any possible witnesses' memories were impaired in those two months. Defendant also has not alleged any physical evidence was destroyed, degraded, or somehow became unavailable because of the delay. Defendant has failed to show actual prejudice affecting his right to a fair trial.

d. Defendant failed to show a due process violation or grossly shocking and outrageous behavior; therefore, reversal of his conviction is not an appropriate remedy.

i. Defendant failed to show a due process violation.

Should this Court consider defendant's claim under the Due Process Clause, defendant has still failed to show a violation. Whether substantive due process rights of an incapacitated criminal defendant have been violated is determined by balancing the defendant's liberty interests in freedom from incarceration and in restorative treatment against the legitimate state interests. ***Trueblood***, 822 F.3d at 1043. The balancing that must be done in this case concerns, and should be heavily weighted by, the legitimate state interests in prosecuting violations of its criminal laws and in assuring defendants are present for their criminal court proceedings. *See* ***State v. McDonald***, 100 Wn. App. 828, 834, 1 P.3d 1176 (2000); *see also* ***State v. Reese***, 15 Wn. App. 619, 620, 55 P.2d 1179 (1976).

The substantive due process analysis relied on by defendant is based primarily on ***Oregon Advocacy Center v. Mink***, 322 F.3d at 1101, 1121 (9th Cir. 2003). ***Mink***, however, is distinguishable from the current case. ***Mink*** found a due process violation when incarceration bore "no reasonable relation to the evaluative and restorative purposes for which courts commit" incapacitated individuals. *Id.* at 1122. ***Mink*** does not balance the

incapacitated individual's interest in liberty against a prosecuting authority's interests in restraining individual liberty to ensure that violations of the law prosecuted as well as to restore competency to those accused of such crimes. ***Mink's*** balancing test only applies to those incarcerated solely due to their incapacity to proceed to trial. The test does not apply to defendant as his incarceration for competency restoration was ancillary to the incarceration attending his inability to post the bail imposed on pending charges. That bail took into consideration the nature of the charged offenses, the risk he would flee if not confined, and the extensive history of criminal convictions he acquired before the pending charges. CrR 3.2.

Defendant additionally cites ***Jackson v. Indiana*** in echoing the ***Mink*** balancing test of whether the duration of incarceration bore a "reasonable relation to the purpose for which defendant was being held: that is competency restoration." Brief of App. 10; ***Jackson v. Indiana***, 406 U.S. 715, 733, 92 S. Ct. 1845 (1972). However, in doing so defendant seemingly implies his incarceration was for the sole purpose of competency restoration, as in ***Jackson*** which is also distinguishable from the present case. The defendant in ***Jackson*** had almost no communication skills and was found unlikely to ever be competent to stand trial. ***Jackson***, 406 U.S. at 718-19. He had no criminal record and was ordered to be committed for an indefinite period of time. *Id.* at 719. The Supreme Court struck down his indefinite incarceration. *Id.* at 720. Defendant in this case demonstrated a capacity to form a factual and rational understanding of his pending criminal

proceedings prior to his transfer to Western State Hospital for competency restoration. He demonstrated the ability to assist in his own defense without restoration services. His capacity to stand trial and his abilities far exceeded those of the defendant in ***Jackson***. Further, defendant's long criminal history that combined with other factors to justify the bail imposed on defendant's cases distinguishes him from Jackson, who had no criminal history. Finally, unlike in ***Jackson***, defendant was not to be transferred to Western State Hospital for an indefinite period of time but for a period not to exceed 45 days.

Defendant is unlike the classes of persons affected in ***Mink*** and ***Jackson***, he was not incarcerated for evaluative and restorative purposes. He was incarcerated and held on $50,000 bail based on the charges, which included escape in the first degree, his extensive criminal history, and his propensity for noncompliance with court orders. Defendant was facing 63 to 84 months in prison based on his high offender score of roughly 25. 3/4/15RP 9. Defendant's lengthy criminal history dates back to 1978 and consists of at least 29 felony convictions, including two bail jumping convictions. CP 250-62. His current charges stem from his failure to report to the Alternative to Confinement (ATC) program he entered as sentenced for a previous conviction. CP 265-68. After submitting a urinalysis that tested positive for methamphetamines, defendant failed to make contact with ATC staff, failed to check-in, and failed to respond to contact attempts

made by the ATC staff. CP 265-268. He was in possession of methamphetamine when he was arrested. CP 497-99.

This is a case in which the record strongly supports an inference that defendant was gaming the system to avoid incarceration. He said as much by stating there was "no advantage to him to appear competent." CP 113. Defendant is a savvy, career criminal who is very familiar with the criminal justice system. During the time he was to be receiving restorative services at Western State Hospital, he focused his efforts instead on goal-directed behaviors such as filing complaints against the agencies he believed violated his rights and making calls to consumer advocacy agencies and to his attorney. CP 121-128. Even without restorative services, defendant's behaviors were consistent with someone who had a logical "understanding and appreciation of components necessary to building a defense strategy." CP 121-128. His words and conduct manifested an illegitimate strategy to use a claim of incompetency to avoid or delay prosecution for violating criminal laws.

Defendant's liberty interest in freedom from incarceration was not impeded by the two month delay in his transfer to Western State Hospital, it was impeded by his own repeated violations of state criminal laws. His interest in avoiding incarceration for his crimes is far outweighed by the legitimate state interest in prosecuting violations of its criminal laws. The state interest is particularly strong with regards to recidivist offenders like defendant because of the increased likelihood for his future violations of the

law and desire to avoid re-incarceration through illegal or illegitimate means. *See* ***U.S. v. Knights***, 534 U.S. 112, 120, 122 S. Ct. 587 (2001); *see also* ***Samson v. California***, 547 U.S. 843, 853-54, 126 S. Ct. 2193 (2006).

ii. Reversal of defendant's conviction is not an appropriate remedy.

To the extent that the Due Process Clause could be applied to defendant's claim, such an analysis would not result in a reversal of the conviction in this case. Conduct must be so grossly shocking and outrageous as to violate the universal sense of justice to warrant dismissal on due process grounds. ***State v. Rundquist***, 79 Wn. App. 786, 793-94, 905 P.2d 922 (1995); ***United States v. Kearns***, 5 F.3d 12512, 1253 (9th Cir. 1993) "Such conduct must . . . violat[e] the concept of fundamental fairness inherent in due process and shoc[k] the senses of universal justice mandated by the due process clause." ***Rundquist***, 79 Wn. App. at 794. A delay of approximately two months for the constitutional purpose of ensuring defendant was competent to assist his counsel at trial does not meet this standard.

Defendant, in arguing his conviction should be reversed, relies on ***Trueblood*** and ***Oregon Advocacy Center v. Mink***, 322 F.3d 1101 (9th Cir. 2003). However, his reliance on those cases is misplaced. ***Trueblood*** and ***Mink*** were both civil cases and the remedies sought in those cases were injunctive and declaratory relief, not reversal of criminal convictions defendant pursues in this case. ***Trueblood***, 822 F.3d at 1041; ***Mink***, 322

F.3d at 1107. Defendant provides no authority supporting a reversal of his lawfully obtained conviction based on an administrative delay on the part of Western State Hospital resulting from inadequate resources to meet the increasing demand of its services. A reversal would result in strict liability for an alleged due process violation that had no effect on his ability to present evidence or witnesses and thus no effect on his right to a fair trial. Appropriate remedies for such a violation as alleged by defendant would include injunction, as indicated in ***Trueblood*** and ***Mink***, or restoration of bail, which the evidence shows defendant could not post to secure his release when the no bail hold attending his restoration was removed. The trial court lowered the bail amount on the escape charge by $10,000, thereby reducing the total bail amount to $40,000, and yet defendant still could not make bail. Reversal of his lawfully obtained conviction is not the appropriate remedy for the due process violation claimed by defendant.

Acceptance of defendant's proposed remedy for the due process violation he claims could have far reaching and grave consequences. Savvy defendants would only have to raise an issue of competency and could conceivably have their convictions and charges dismissed due to the predictable shortcomings in Western State Hospital's ability to meet the demands for its services. Defendants who continually and successfully exploit Western State Hospital's inability to meet time limits would set a disturbing trend. If many defendants simultaneously raised issues of competency, they would overload Western State Hospital's capacity,

effectively shutting down services. Setting such a precedent would allow many more attempts to game the criminal justice system by those who would not take services to rehabilitate, while reducing availability of the already strained resources to those who could and would be helped. The trial court properly denied defendant's motion to dismiss because there was no due process violation warranting dismissal.

2. THIS COURT SHOULD DECLINE TO ADDRESS THE AWARD OF APPELLATE COSTS BECAUSE THE ISSUE IS NOT RIPE; THE STATE HAS YET TO SUBSTANTIALLY PREVAIL AND HAS NOT SUBMITTED A COST BILL TO WHICH DEFENDANT MAY OBJECT.

Under RCW 10.73.160, an appellate court may order the recoupment of appellate costs from a convicted defendant. ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). The award of appellate costs to a prevailing party is within the discretion of the appellate court. *See* ***State v. Sinclair***, 192 Wn. App. 380, 383-384, 367 P.2d 612 (2016); *see also* ***State v. Nolan***, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); RAP 14.2. The question is not whether the Court can decide to order appellate costs, but rather when and how the Court will order appellate costs.

The legal principle that convicted offenders contribute toward the costs of the case, including the costs of appointed counsel, goes back many years. In 1976, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of

prosecuting the defendant and his incarceration. RCW 10.01.160(2). Requiring a defendant to contribute toward paying for appointed counsel under this statute does not violate or even "chill" the right to counsel. ***State v. Barklind***, 87 Wn.2d 814, 818, 557 P.2d 314 (1977).

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. RCW 10.73.160(1). In ***Blank***, the Supreme Court held this statute constitutional, affirming this Court's holding in ***State v. Blank***, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996). ***Blank***, 131 Wn.2d at 239.

Under RCW 10.73.160, the time to challenge the imposition of legal financial obligations (LFOs) is when the State seeks to collect the costs. *See* ***Blank***, 131 Wn.2d at 242; *see also* ***State v. Smits***, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *See* ***State v. Baldwin***, 63 Wn. App. 303, 311, 818 P.2d 1116 (1991); *see also* ***State v. Crook***, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). "A defendant's indigent status at the time of sentencing does not bar an award of costs." ***Crook***, 146 Wn. App. at 27. Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *See* ***Blank***, 131 Wn.2d at 241–242; *see also* ***State v. Wright***, 97 Wn. App. 382, 965 P.2d 411 (1999).

It is only after the State has prevailed on appeal that RAP 14.2 affords the appellate court discretion in awarding costs. ***Nolan***, 141 Wn.2d at 626. In ***Nolan***, the defendant began review of the issue by filing an objection to the State's cost bill. *Id.* at 622. The Court in ***Nolan*** was explicit in that disposition of the appeal is required prior to ruling on appellate costs. *Id.* at 625. "[T]he first step in determining if costs under Title 14 of the Rules of Appellate Procedure may be awarded in a criminal appeal is to determine if the State is the substantially prevailing party." *Id.* Defendant's objection to appellate costs in his opening brief prematurely raises an issue that is not before the Court. Brief of App. 18-20. Defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if he does not prevail and if the State files a cost bill.

The defendant has the initial burden to show indigence. *See* ***State v. Lundy***, 176 Wn. App. 96, 104 n.5, 308 P.3d 755 (2013). Defendants who claim indigency "must do more than plead poverty in general terms" in seeking remission or modification of LFOs. ***State v. Woodward***, 116 Wn. App. 697, 704, 67 P.3d 530 (2003). While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *See* ***Woodward***, 116 Wn. App. at 703-04; *see also* ***Bearden v. Georgia***, 461 U.S. 660, 668, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976).

The imposition of LFOs has been much discussed in the appellate courts lately. In ***State v. Blazina***, the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote:

> The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. *See Id.* at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. ***Blazina***, 182 Wn.2d at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. The majority of criminal defendants are represented at public expense at trial and on appeal. To be represented at public expense in trial or on appeal, a defendant must be found to be indigent. *See generally* ***Griffin v. Illinois***, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed 891 (1956). Thus, the majority of the defendants taxed for costs under RCW 10.73.160 are indigent. Additionally, subsection 3 specifically includes "recoupment of fees for court-appointed counsel." RCW 10.73.160(3). It stands to reason then, that the defendants referenced by subsection 3 have been found indigent by the court.

Defendant argues that because he was found indigent at trial, there should be a presumption of indigency upon appeal and based on this, the Court should decline any future requests for costs. Brief of App. 19-20. Under defendant's argument, the Court should excuse any defendant found indigent at trial from payment of all costs at all stages, including appeal. This would, in effect, nullify RCW 10.73.160(3).

As ***Blazina*** instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, the court in ***Sinclair*** points out, the Legislature did not include such a provision in RCW 10.73.160. ***Sinclair***, 192 Wn. App. at 385. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *Id.* at 386 (citing RCW 10.73.160(4)).

In this case, the State has yet to "substantially prevail," nor has it submitted a cost bill to which the defendant may object on the grounds of manifest hardship. Therefore, this Court should wait until the cost issue is ripe before exploring it legally and substantively.

D. CONCLUSION.

This Court should affirm defendant's conviction because defendant failed to allege or prove a violation under the Speedy Trial Clause of the Sixth Amendment, which controls the pretrial delay issue he raised. He has also failed to prove dismissal is warranted under CrR 8.3(b), for he has not proved governmental mismanagement attributable to the prosecution, or as

to Western State Hospital standing alone, and he has likewise failed to prove actual prejudice affecting his right to a fair trial. Defendant's conviction and sentence should be affirmed.

Further, the Court should decline to award appellate costs because the State has yet to substantially prevail and has not submitted a cost bill to which defendant may object.

DATED: December 12, 2016.

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Prosecuting Attorney

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38725

Stacy Norton
Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12-13-16
Date Signature

PIERCE COUNTY PROSECUTOR

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